UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

HUDALJ 10-99-0200-8
HUDALJ 10-99-0391-8
Decided: November 22, 2000

James Reid, Esq., and
S. Bryce Farris, Esq.,
for the Respondents.

David F. Morado, Esq., and
Jo Ann Riggs, Esq.,
for the Secretary and the Complainants.

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DECISION AND ORDER ON ATTORNEY FEES AND COSTS

On August 29, 2000, Respondents filed their Application For Costs And Attorney

Fees (the Application) for the above-captioned case. Respondents seek $1,526.58 in costs and $16,454.50 in attorney fees for Ringert Clark Chartered, attorneys for Respondents, who were represented in the person of James G. Reid, Esquire. Mr. Reid also filed an affidavit explaining how these figures were reached along with a Detail Cost Transaction List which shows every cost and fee incurred by Ringert Clark Chartered. Accompanying the pleadings named above is an Affidavit Of Bob Skalak which deals with the retention of Ringert Clark and the net worth of Blue Meadows Associates. This affidavit is accompanied by Exhibit A, a copy each of Balance Sheet (Cash) Consolidated Statement for December 1999 and July 2000.

The Charging Party filed an Answer In Opposition To Respondents' Application For Costs And Attorney Fees (Answer In Opposition) on September 28, 2000. In the Answer, Counsel for the Secretary asserts the Charging Party's position that the Respondents' Application should be denied because Respondents do not qualify as eligible parties under the Equal Access To Justice Act (EAJA), did not submit the required net worth statements for two principal Respondents, and because the Department's position was substantially justified.

Respondents filed a Reply Memorandum Supporting Application for Costs And Attorney Fees (Respondents' Reply) on October 10, 2000. Finally, on October 23, 2000, the Secretary filed a Reply Memorandum Opposing Respondents' Application For Costs And Attorney Fees (Secretary's Reply), which has attached to it an Affidavit Of Jo Ann Riggs In Support Of Reply Memorandum Opposing Respondents' Application For Costs And Attorney Fees (Riggs Affidavit), a copy of Respondents' Answers To Charging Party's First Set Of Interrogatories And Request For Production, a copy of a brochure entitled *APARTMENT BLUE BOOK*, and a page from the Internet web site for the State of Washington, Office of the Secretary of State, Corporation Division, which provides registration information for Quantum Residential, Inc. (Internet Print-Out).

Applicable Law

In Fair Housing Act cases where Respondent is the prevailing party, HUD is liable for reasonable attorney fees and costs to the extent allowable under the Equal Access to Justice Act (EAJA). 42 U.S.C. Sec. 3612(p); 24 CFR 180.705. When the prevailing Respondent makes the request for fees and costs it must be shown that certain eligibility requirements are met. 24 CFR 14.120. If the eligibity requirements are met Respondent is entitled to the fees and costs unless the Secretary can show that HUD's position in the case was substantially justified or that special circumstances render an award of the fees and costs unjust. 5 U.S.C.§504(a)(1); 24 CFR 14.105.

A. Eligibility

Respondent applicants for fees and costs have the burden of proving eligibility. *See Love v. Reilly,* 924 F.2d 1492, 1494 (9th Cir. 1991); *Thomas v. Peterson,* 841 F.2d 332, 337 (9th Cir. 1988). To be eligible for reimbursement of fees and costs, the prevailing Respondent must show that its net worth is not more than seven million dollars and that it does not have more than 500 employees. 24 CFR 14.120(b)(5); 5 U.S.C. § 504(b)(1)(B). Further, to be eligible an applicant must meet all of the conditions set out in subpart B of the EAJA regulations. 24 CFR 14.120(a). This subpart requires that Respondent submit certain information in its application, including a statement that applicant's net worth does not exceed $7 million for all applicants including their affiliates. 24 CFR 14.200(b).

The net worth statement submitted by an applicant for reimbursement of fees and costs must include "a detailed exhibit showing net worth of the applicant and any affiliates." 24 CFR 14.205(a). This exhibit is for the time "when the proceeding was initiated." 24 CFR 14.205. Here, "the proceeding" means the Fair Housing case; not the EAJA adjudication. 24 CFR 14.115; *see also* H. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 5003, 5011. HUD's regulations require that the net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. 24 CFR 14.120(f).[1] For these purposes, an "affiliate" is defined as follows:

> Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

24 CFR 14.120(f).

Respondents' Application asserts that Blue Meadows Associates (BMA) owns Blue Meadows Apartments and that BMA contracted with counsel for legal fees. The

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1 Courts have stated that EAJA does not include a general aggregation requirement. *See, e.g., Tri-State Steel Const. Co., Inc. v. Herman,* 164 F.3d 973, 978-80 (6th Cir. 1999). Instead, courts have applied various standards, including the "real party in interest test," to determine whether aggregation is appropriate. Under these standards, given the facts of this case, aggregation is appropriate. *See infra* pp. 4-5. In addition, HUD regulations require aggregation of all affiliates' net worth. 24 CFR 14.120(f).

ownership of BMA was listed as follows: 25 percent by Realvest Corporation, 25 percent by Gilbert Bros. Real Estate Services, and 50 percent by Larry Stoker. *See* Affidavit of Bob Skalak, Manager of BMA, attachment to the Application; *see also* Affidavit of Attorney James G. Reid concerning who he is representing. The Application contains a net worth exhibit representing that BMA's net worth was less than $7 million and that it had fewer than 500 employees at the appropriate time.

As the Secretary points out, Respondents' submissions are inconsistent with the record. The Complaint that initiated the Fair Housing proceedings states that Blue Meadows Limited Partnership (BMLP) was the owner of the property, that BMA was a general partner of BMLP, that Realvest Corp. was a general partner in BMLP, and that Realvest was "the entity responsible for management of the subject property." Complaint, ¶¶ 9-11. Respondents admitted these relationships in their Answer To The Complaint (Answer). at ¶4. Moreover, it was found in the Initial Decision (ID) that BMLP owns the property, BMLP and Realvest are general partners of BMA, and that Realvest manages the property. ID, ¶¶ 4-5.

Further, during the hearing Bob Skalak's wife identified him as "area manager," working for "Real Best [sic]." Transcript of the hearing, p. 478 (T 478), whereas he identifies himself in his affidavit as the manager of BMA. HUD, in its Reply Memorandum, notes that Respondents' counsel's billing ledger shows payments having been received from "QUANTUM RESIDENTIAL -- BLUE MEADOWS." Quantum Residential (QR) is a Washington State corporation whose chairman of the board is one Paul Christensen. According to Respondents' responses to interrogatories, Paul Christensen is president of Realvest. *See* Riggs Affidavit and accompanying Internet Print-Out; Respondents' Answers to Interrogatories.

Thus, the record indicates that BMLP should have been the applicant for fees and costs. With BMLP as the applicant, certainly Realvest is an affiliate under the regulations, and the failure to submit net worth statements would result in a denial of the requested attorney fees and costs. Even if BMA is accepted as the rightful fee applicant, given the record of inconsistent facts, Realvest's management in the property, and its involvement in both BMA and BMLP, the regulations provide a basis for considering Realvest to be an affiliate. In that case, because Respondents failed to submit a net worth statement for Realvest, or to demonstrate that even if the entities' net worths were to be aggregated they would be eligible, Respondents should not be entitled to attorney fees and costs. *See* 24 CFR 14.120(a), (b) and (f); 14.205(a).

Moreover, there is a need to aggregate the entities in this case because even if BMA were eligible on its own, the record reveals that it was litigating on behalf of other entities and affiliates. *See Tri-State Steel Const. Co., Inc. v. Herman,* 164 F.3d 973, 978-80 (6th Cir. 1999); *Caremore, Inc. v. NLRB,* 150 F.3d 628 (6th Cir. 1998). The record also reveals the intertwining relationships and Respondents' inconsistent statements on ownership and parties. Thus, it must be said that if BMA were the prevailing party it was litigating on behalf of BMLP, which has Realvest as a general partner, and therefore was litigating on Realvest's behalf as well. In that line of thought all three of these entities' net worths should have been aggregated, but they were not.

In addition, under the "real party in interest" test, the application should not survive. In *Unification Church v. INS*, the court rejected an application for fees from three church members and their church, finding that the relationship between the members and their church was that of an employer and its employees. 762 F.2d 1077 (D.C. Cir. 1985). The court used a "real party in interest" test, while admitting that this test, although applicable in other areas of the law, was "unusual but not unprecedented" for use in EAJA cases. Given that QR is shown by the Respondents to have paid the fees there is the basis for asserting that QR is the real party in interest under this test. Since no net worth report was submitted for Quantum Residential there is this further reason that the Application should be denied. *See also National Association of Manufacturers v. DOL,* 159 F.3d 597, 604-05 (D.C. Cir. 1998); *Love v. Reilly,* 924 F.2d 1492, 1494 (9th Cir. 1991).

B. Justification

Provided that eligibility requirements are met, Respondent applicants for fees and costs are entitled to have them awarded unless HUD's position was "substantially justified" or special circumstances make an award unjust. 24 CFR 14.105. The burden is on HUD to demonstrate that its position was substantially justified. *See, e.g., Whest v. Heckler,* 763 F.2d 1025 (8th Cir. 1985); *Local 3-98, Int'l. Woodworkers of Am. AFL-CIO v. Donovan,* 580 F. Supp. 714 (N.D. Cal. 1984), *aff'd in part, rev'd in part on other grounds,* 769 F.2d 1388, *opinion amended*, 792 F.2d 762 (9th Cir. 1985). "Substantially justified" essentially means "reasonable in law and fact." 24 CFR 14.125(a). Another interpretation is that the Government's position must be "justified in the substance or in the main -- that is, justified to a degree that could satisfy the reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 565 (1988).

Since it has been found, as explained above, that the Respondents have failed to demonstrate eligibility for the awarding of attorney fees and costs, it is not necessary to discuss at length whether their application would fail because the Secretary's position was substantially justified. Nonetheless, a short view of this element is not inappropriate.

The Secretary's position in this case was reasonable in law and fact, which is a

lower standard than "preponderance of the evidence," as its meaning is described by the court in *Pierce*. The Secretary's case failed, not because it was "not justified to a degree that could satisfy the reasonable person," but because of a failure to prove all the requirements of the *prima facie* case. This failure was in turn caused by failures of corroboration in the hearing and failures of the aggrieved party to complete his application. Thus, the Application for fees and costs should also be denied because HUD's position was substantially justified.

Order

Respondents have failed to show that they are eligible for reimbursement of their attorney fees and costs and the Secretary has shown that HUD's position in this case was substantially justified. For these reasons, the Respondents' Application For Costs And Attorney Fees ought to be, and hereby is, **DENIED**.

This Order is entered pursuant to 42 U.S.C. §3612(p), and the Regulations of the Department of Housing and Urban Development that are codified at 24 CFR 14.330, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time. 24 CFR 14.335., 180.680(b).

So **ORDERED**.

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ROBERT A. ANDRETTA
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER ON ATTORNEY FEES AND COSTS, issued by ROBERT A. ANDRETTA, Administrative Law Judge, in HUDALJ 10-99-0200-8, and HUDALJ 10-99-0391-8, were sent to the following parties on this 22nd day of November, 2000, in the manner indicated:

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